Lee Chin Huat & Anor v Choo Keng Hee & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–1899 OF 2009
RAMLY ALI, JEFFREY TAN AND ZAHARAH IBRAHIM JJCA
21 NOVEMBER 2011

Contract — Breach — Breach of undertaking — Whether proven — Construction of terms of undertaking — Whether trial judge erred in construing first limb in isolation — Whether second limb was integral part of entire undertaking — Whether interpretation had led to absurd result

The appellants had entered into a sale and purchase agreement ('the first SPA') with Zinma Housing Devt Sdn Bhd ('Zinma') to purchase a piece of land situated in Senai-Kulim ('the land'). After the appellants had paid the purchase price of RM600,000 they discovered that the transfer of the land had not been registered because a portion of the land had been compulsorily acquired. The appellants demanded a refund of the purchase price from Zinma but the latter agreed to secure a third party to purchase the land from the appellants. By a sale and purchase agreement ('the second SPA') Zinma sold the land to a third party. The second SPA was prepared by the respondents, the partners of a firm of solicitors known as KH Choo & Co. In order to facilitate the third party purchaser's bank loan, the respondents requested for and received the original title deed to the land ('the title deed') from the appellants. At the same time the respondents also issued a letter of undertaking to forward RM600,000 upon release of the loan sum by the bank, to the appellants or return the title deed to the appellants. The second SPA was also aborted but the respondents did not pay the RM600,000 to the appellants or return the title deed to the appellants. The appellants commenced an action against the respondents for breach of their undertaking. The trial judge found that there were two parts to the respondents' undertaking, namely the undertaking to forward RM600,000 to the appellants upon receipt of the loan amount from the bank ('the first limb') and in the event of default of the former to return the title deed to the appellants ('the second limb'). Since there was no release of the loan sum by the bank and the first limb could not be performed, the trial judge held that the respondents could not be called upon to fulfill their undertaking under the second limb. The High Court thus held that there was no breach of the undertaking by the respondents. This was the appellants' appeal against that judgment.

Held, allowing the appeal with costs:

(1) The trial judge appreciated that the respondents' undertaking had two limbs but it separated the two limbs and constructed the first limb in isolation while ignoring the second limb. As such, in the construction of the undertaking, the trial court failed to give effect to every part of it. However, for the purpose of construction of the undertaking the second limb was an integral part of the entire undertaking and so must be considered *ex antecedentibus et consequentibus*, in order to read the undertaking as a whole to ascertain the true meaning of the two limbs. On a proper construction of the two limbs in the context of the undertaking as a whole, it was clear that the respondents had undertaken to forward the sum of RM600,000 to the appellants upon receipt of the loan sum from the bank or return the title deed to the appellants. It was the performance of one or the other. This could only mean that when the first limb could not be performed, under the second limb the respondent was obliged to return the document of title to the land to the appellants. Since neither limb was performed, there was a clear breach of the undertaking (see paras 6–9).

(2) In interpreting the undertaking there was a requirement to interpret the undertaking in such a manner that would lead to a reasonable rather than an absurd result. It would be an absurd result, which could not have been the intention of the parties, if the appellants were to be left without RM600,000 or the title deed. Since the title deed had been wrongly released by the respondents to Zinma, the respondents should be ordered to honour their undertaking by the only doable mode ie the payment of the sum of RM600,000 with interest as claimed to the appellants (see paras 10–11).

[Bahasa Malaysia summary

Perayu-perayu telah memeterai perjanjian jual beli ('PJB pertama') dengan Zinma Housing Devt Sdn Bhd ('Zinma') untuk membeli sebidang tanah yang terletak di Senai-Kulim ('tanah tersebut'). Selepas perayu-perayu membayar harga belian RM600,000 mereka mendapati bahawa pindah milik tanah tersebut belum lagi didaftarkan kerana sebahagian tanah telah diambil alih. Perayu-perayu menuntut balik bayaran harga belian daripada Zinma tetapi Zinma bersetuju untuk mendapatkan pihak ketiga agar membeli tanah tersebut daripada perayu-perayu. Menurut perjanjian jual beli ('PJB kedua') Zinma menjual tanah tersebut kepada pihak ketiga. PJB kedua telah disediakan oleh responden-responden, rakan-rakan kongsi firma guaman yang dikenali sebagai KH Choo & Co. Dalam usaha memberikan kemudahan pinjaman bank kepada pembeli pihak ketiga, responden-responden meminta dan menerima surat ikatan hak milik asal bagi tanah tanah ('surat ikatan hak

milik') daripada perayu-perayu. Pada masa yang sama responden-responden juga telah mengeluarkan surat akujanji untuk mengemukakan RM600,000 atas pelepasan jumlah pinjaman oleh bank, kepada perayu-perayu atau memulangkan surat ikatan hak milik kepada perayu-perayu. PJB kedua juga telah ditamatkan tetapi responden-responden tidak membayar RM600,000 kepada perayu-perayu atau memulangkan surat ikatan hak milik kepada perayu-perayu. Perayu-perayu telah memulakan suatu tindakan terhadap responden-responden atas pelanggaran akujanji mereka. Hakim bicara mendapati bahawa terdapat dua bahagian dalam akujanji responden-responden, iaitu akujanji untuk mengemukakan RM600,000 kepada perayu-perayu apabila menerima jumlah pinjaman daripada bank ('bahagian pertama') dan sekiranya berlaku pelanggaran, pengembalian hak milik kepada perayu-perayu ('bahagian kedua'). Oleh kerana tiada pelepasan jumlah pinjaman oleh bank dan bahagian pertama tidak dapat dilaksanakan, hakim bicara memutuskan bahawa responden-responden tidak boleh diperintahkan untuk memenuhi akujanji mereka di bawah bahagian kedua. Dengan itu, Mahkamah Tinggi memutuskan bahawa tidak berlaku pelanggaran akujanji oleh responden-responden. Ini adalah rayuan perayu-perayu terhadap penghakiman tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Hakim bicara telah mempertimbangkan bahawa akujanji responden-responden mempunyai dua bahagian tetapi beliau telah memisahkan dua bahagian tersebut dan mentafsirkan bahagian pertama secara berasingan sambil mengabaikan bahagian kedua. Oleh itu, dalam tafsiran akujanji tersebut, mahkamah gagal memberi kesan kepada kedua-dua bahagian. Walau bagaimanapun, bagi tujuan tafsiran akujanji, bahagian kedua merupakan sebahagian daripada keseluruhan akujanji dan semestinya dipertimbangkan *ex antecedentibus et consequentibus*, untuk mentafsir akujanji secara keseluruhannya bagi memastikan maksud sebenar kedua-dua bahagian. Dengan tafsiran yang sepatutnya ke atas kedua-dua bahagian dalam konteks akujanji secara keseluruhannya, adalah jelas bahawa responden-responden telah mengakujanji untuk mengemukakan sejumlah RM600,000 kepada perayu-perayu apabila menerima jumlah pinjaman daripada bank atau memulangkan surat hak milik kepada perayu-perayu. Ia adalah pelaksanaan satu atau yang lain. Ini hanya bermaksud bahawa apabila bahagian pertama tidak dapat dilaksanakan, responden-responden berkewajipan untuk memulangkan dokumen hak milik tanah kepada perayu-perayu di bawah bahagian kedua. Oleh kerana kedua-dua bahagian tidak dapat dilaksanakan, terdapat pelanggaran yang jelas pada akujanji tersebut (lihat perenggan 6–9).

(2) Dalam mentafsirkan akujanji tersebut, terdapat keperluan untuk mentafsir akujanji dalam apa-apa cara yang akan membawa kepada keputusan yang munasabah dan bukannya keputusan yang tidak logik. Ia akan menjadi satu keputusan yang tidak logik, yang tidak diniatkan oleh pihak-pihak, jika perayu-perayu dibiarkan tanpa RM600,000 atau surat ikatan hak milik. Oleh kerana surat ikatan hak milik telah dikeluarkan secara khilaf oleh responden-responden kepada Zinma, responden-responden harus diperintahkan untuk menunaikan akujanji mereka dengan cara yang hanya boleh dilakukan iaitu pembayaran RM600,000 dengan faedah yang dituntut kepada perayu-perayu (lihat perenggan 10–11).]

Cases referred to

Barton v Fitzgerald (1812) 15 East 530 (refd)
Brinkerhoff International Inc v Numac Energy Inc [1996] AJ No 883 (refd)
Chamber Colliery Co Ltd v Twyerould [1915] 1 Ch 268, HL (refd)
Consolidated Bathurst Export Ltd v Mutual Boiler and Machinery Insurance Co (1979) 112 DLR (3d) 49, SC (refd)
ICI Paints (Canada) Inc v JM Breton Plastering (1984) Co [1992] 116 NSR (2d) 385, CA (refd)
Kubota Canada Ltd v Merchant Private Ltd [1997] OJ No 2028 (refd)
National Coal Board v Wm Neill & Son (St Helen) Ltd [1984] 1 All ER 555, QBD (refd)
Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd [1990] 2 MLJ 163, HC (refd)

Chin Choong Seong (Chin & Yau) for the appellants.
George Neo (Yeo, Tan, Hoon & Tee) for the respondents.

Jeffrey Tan JCA (delivering judgment of the court):

[1] This is an appeal against the dismissal, by the trial court on 14 June 2011, of the appellants' claim against the respondents, who were the partners of a firm of solicitors known as KH Choo & Co, for the sum of RM600,000 on account of the respondents' alleged breach of their following undertaking:

K. H. CHOO & CO.

ADVOCATES & SOLICITORS

PEGUAMBELA & PEGUAM CARA

Our Ref: CKH/SAG/10870/03

Your Ref:

Date: 27th August, 2003

Mr Lee Chin Tiat &

Mr Ng Kian Wan

No. 122, Taman Muhibah,

84400 Sungai Mati,

Johor Darul Takzim.

Dear Sirs,

Re: Sale and Purchase of Property held under GM 275 Lot 1105 (formerly known as EMR 2587 Lot 1105) Mukim Senai Kulai

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We refer to the abovementioned matter and confirm that the sale thereof is now aborted and both of you shall forward to us the form for the withdrawal/cancellation of the private caveats lodged by you together with the original title deed of the said land on our undertaking to forward to you the sum of RM600,000-00 upon receipt of the loan amount from Messrs Southern Bank Berhad failing which we shall return to you the withdrawal of private caveat and the original title deed.

Yours faithfully,

[2] That aforesaid undertaking came about in the following circumstances. By a sale and purchase agreement dated 21 May 2001, the appellants purchased land held under GM 275 Lot 1105 Mukim Senai-Kulim ('said land') from one Zinma Housing Development Sdn Bhd ('Zinma'). The appellants paid the purchase consideration of RM600,000. The document of title to the land was surrendered to the appellants (see p 37 of the appeal record). But transfer of the said land was not presented for registration. The reason for that, according to the witness statement of the second appellant, was that it was discovered that 1.696 acres of the said land had been compulsorily acquired in 1999 from the agreed acreage (3 acres) of the said land (see 37AR). The appellants demanded a refund of the purchase price, but Zinma, who professed no ability to do so, instead agreed to secure a third party to purchase the said land from the appellants. As the said land was still registered in the name of Zinma, it was agreed that any sale and purchase agreement with the third party purchaser would be entered into by Zinma as vendor. In due course, Zinma secured a

A third party to purchase the said land. By a sale and purchase agreement dated 15 July 2003 (see 94–100AR), Zinma sold the said land to one Koo Kim Huat for RM2,700,000 (see 100AR). That sale and purchase agreement dated 15 July 2003 was prepared by the respondents.

B **[3]** What transpired thereafter was summed up by the trial court as follows:

> In order to facilitate the release of the new purchaser's bank loan, the defendants requested for and received the original title deed to the land from the plaintiffs on 27 August 2003; which receipt thereof was acknowledged by the defendants' letter
C of even date. At the same time, the defendants also issued another letter undertaking to forward RM600,000 or return the original title deed to the plaintiffs.
>
> The second SPA was also aborted subsequently. The defendants did not pay the RM600,000 to the plaintiffs or returned the original title deed (see 14AR).

D **[4]** It was the finding of the trial court that the sale and purchase agreement dated 21 May 2001 between the appellants and Zinma, and the sale and purchase agreement dated 15 July 2003 between Zinma and the said Koo Kim Huat, were both aborted. It was also the finding of the trial court that the
E defence, that the sale and purchase agreement dated 21 May 2001 was an illegal money lending transaction, had no merits whatsoever (see 17AR).

[5] However, it was the finding of the trial court, upon its construction of the undertaking dated 27 August 2003, that the respondents could only be called
F upon to pay RM600,000 upon receipt of the loan amount from the Southern Bank Bhd. At 18AR, the trial court held as follows:

> The plaintiffs are only claiming for the RM600,000 which they say that they ought to be paid. The language of the undertaking is clear and straightforward. It provides that the sum of RM600,000 is only payable upon receipt of the loan amount from
G the bank. It is not in dispute that the loan amount was not released by the bank. In the premises, the condition precedent to the payment of the RM600,000 to the plaintiffs were not satisfied. Put another way, the defendants' obligations to pay did not crystallise as the loan amount was not paid to the defendants. Further, there is no provision in the undertaking which states that the defendants are obliged to pay
H RM600,000 to the plaintiffs in any other event. On the facts and on a true construction of the undertaking, the defendants' obligations are that they will apply the money when they receive it. Since they have not received the money they cannot be called upon to fulfil their undertaking for to do so would be premature on the part of the plaintiffs. Therefore on the facts as disclosed and on the language of the
I undertaking there has been no breach of the undertaking.

[6] The trial court appreciated that the respondents' undertaking had two limbs, namely (i) 'to forward … the sum of RM600,000 upon receipt of the loan amount from Messrs Southern Bank Bhd' and (ii) 'failing which to return the withdrawal of private caveat (form) and the original title deed'. But unfortunately, the trial court failed to appreciate that the sum of the respondents' undertaking was greater than the sum of its individual parts (two limbs). What the trial court had done was to separate the two limbs and construct one, rather than to construct both limbs as a whole. That was evident at 18AR, where the trial court perceived the two limbs as follows:

> The undertaking was given to enable the release of the new purchaser's loan under the second SPA. The wordings of the undertaking are quite clear and unambiguous. There are two parts. Firstly, it stipulates that the defendants undertake to forward RM600,000 on receipt of the loan amount from the bank. Secondly, it provides that in the event of default of the former, the defendants shall return the original title deed to the plaintiffs. *As the second part is no longer an issue in contention, the court will proceed to deal with the first part only*. (Emphasis added).

[7] The first limb was constructed in isolation while the second limb was ignored. In the upshot, in its construction of the undertaking, the trial court failed to give effect to every part of it (see *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163, where Lim Beng Choon J upheld the general principles of construction of a contract as enunciated in *National Coal Board v Wm Neill & Son (St Helen) Ltd* [1984] 1 All ER 555 where it was held at p 560 that a contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it).

[8] The trial court held that 'as the second (limb) is no longer an issue in contention, the court will proceed to deal with the first part only'. But with respect, the second limb was not an issue, if at all, only in the sense that it was not disputed that the document of title was not returned by the respondents to the appellants as promised. However, for the purpose of construction of the undertaking, the second limb was an integral part of the entire undertaking and so must be considered *ex antecedentibus et consequentibus*, in order to collect from the undertaking the one uniform and consistent sense (see *Barton v Fitzgerald* (1812) 15 East 530), in order to read the undertaking as a whole to ascertain the true meaning of the two limbs, and in order to interpret those two limbs in harmony with the other (*Chamber Colliery Co Ltd v Twyerould* [1915] 1 Ch 268).

[9] The first limb undoubtedly provided that the respondents pay RM600,000 only when the loan amount was received. But the first limb was not the entire embodiment of the undertaking. There was yet that second limb which required the respondents to return the document of title to the appellants. That second limb could not be effaced from the undertaking, as if

it were not there. Rather, on a proper construction of the two limbs in the context of the undertaking as a whole, the respondents had undertaken to forward the sum of RM600,000 to the appellants upon receipt of the loan amount from Messrs Southern Bank Bhd or return the withdrawal of private caveat (form) and the original title deed to the appellants. It was the performance of one or the other. The respondents had to pay RM600,000 to the appellants or return the withdrawal of caveat form together with the document of title to the appellants. The undertaking when read as a whole, should and could only impart that when the loan amount was not received from the Southern Bank Bhd, in other words, when the first limb could not be performed, the second limb immediately kicked in that thereupon obliged the respondents to return the document of title to the appellants. Since neither limb was performed, there was a clear breach of the undertaking.

[10] In interpreting the undertaking, there was a requirement to interpret the undertaking in such a manner that would lead to a reasonable rather than an absurd result (see *ICI Paints (Canada) Inc v JM Breton Plastering (1984) Co* [1992] 116 NSR (2d) 385). 'A Court is entitled to consider the logical consequences of each. When one interpretation would lead to an absurdity and the other would not, the courts are entitled to conclude that the contract was not intended to produce an absurd result' (see *Brinkerhoff International Inc v Numac Energy Inc* [1996] AJ No 883). 'Contracts should be interpreted to produce a common-sense interpretation in keeping with the purpose of the contract and the intention of the parties' (see *Kubota Canada Ltd v Merchant Private Ltd* [1997] OJ No 2028). 'An interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result' (see *Consolidated Bathurst Export Ltd v Mutual Boiler and Machinery Insurance Co* (1979) 112 DLR (3d) 49 at p 58).

[11] And in our opinion, it was an absurd result which could not have been the intention of the negotiating parties that the appellants would be left without RM600,000 or document of title. That result must be put right. Since the title had been wrongly released by the respondents to Zinma who would not return the same to the respondents (see 41–48AR), it would therefore seem that the respondents could only be ordered to honour their undertaking by the only doable mode, by payment of the sum of RM600,000 to the appellants.

[12] For those reasons, we unanimously allow the appeal with costs and order the respondents to pay to the appellants the sum of RM600,000 together with interests as claimed.

Appeal allowed with costs.

Reported by Kohila Nesan